SUPREME COURT OF THE UNITED STATES.

No. ~~186~~. 73.

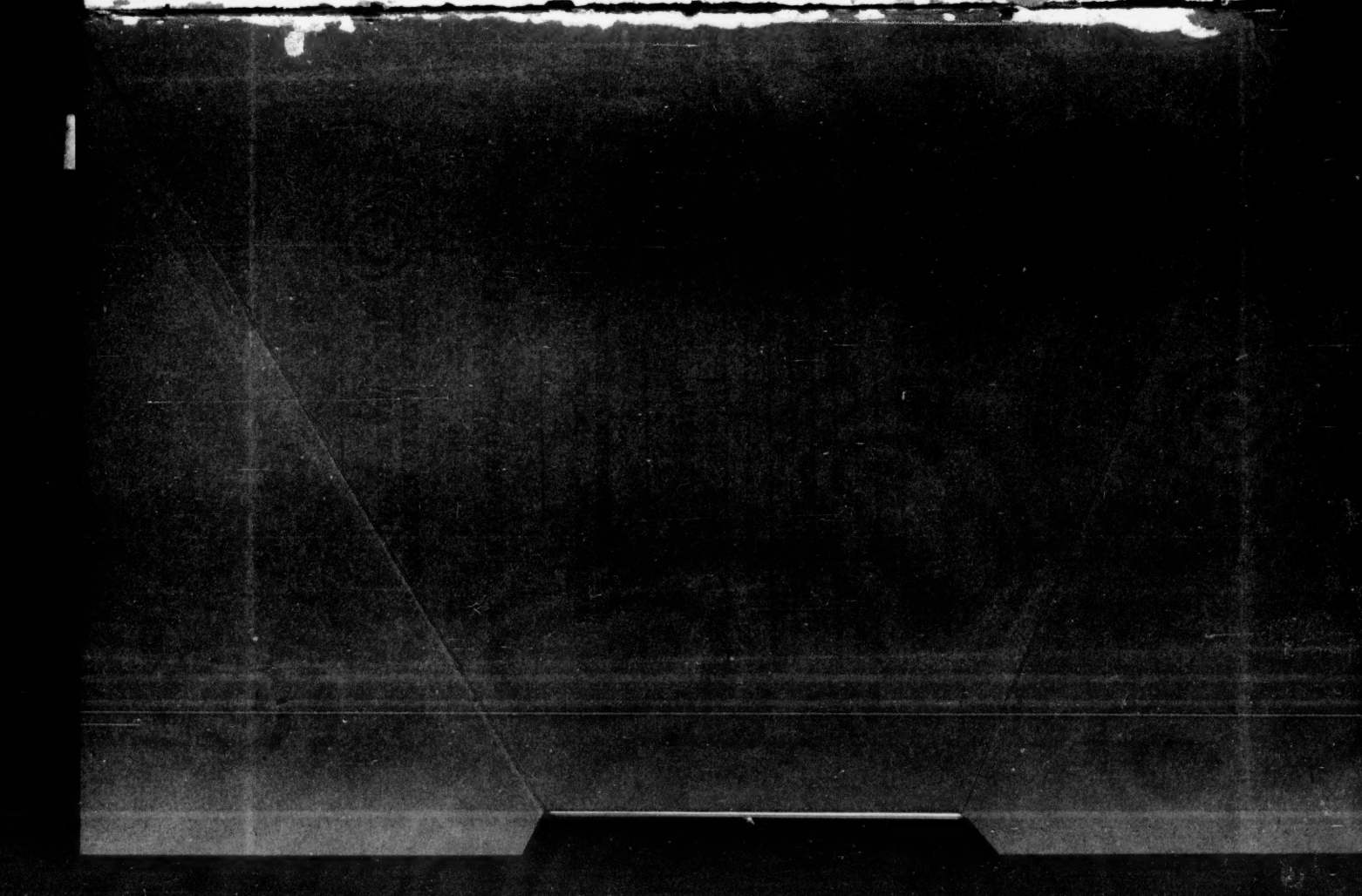
WILLIAM T. LOWBER, JOHN R. WILMER, AND FREDERICK LENNIG, PL'FFS IN ERROR,

vs.

ELKANAH BANGS AND WILLIAM H. BANGS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

GOVERNMENT PRINTING OFFICE.



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UNITED STATES, *ss:*

The President of the United States to the judges of the circuit court holden in and for the district of Massachusetts, greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you, or some of you, between Elkanah Bangs and William H. Bangs, of Boston, in the State of Massachusetts, merchants, plaintiffs, and William T. Lowber, John R. Wilmer and Frederic Lennig, of Philadelphia, in the State of Pennsylvania, defendants, in a plea of the case, a manifest error has intervened to the great damage of the said Lowber, Wilmer and Lennig, as in their complaint has been stated. And as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded, that, if judgment thereof be given, then under your seal you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the chief justice and the associate justices of the Supreme Court of the United States, on the first Monday of December next, at Washington, being the present seat of the national government; that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honorable Roger B. Taney, esquire, chief justice of the said Supreme Court, at Washington aforesaid, this eighteenth day of November, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-seventh.

H. W. FULLER, *Clerk.*

Allowed by—

NATHAN CLIFFORD,
Associate Jus. S. C. U. S.

United States of America.

CIRCUIT COURT OF THE U. S.,
Massachusetts District, ss:

And now here the judges of the circuit court of the United States for said district make return of this writ, by annexing hereto and sending herewith a true and attested copy of the record and process, and of all proceedings in the suit within mentioned, and under their seal of court.

In witness whereof, I, Henry W. Fuller, clerk of said circuit court, have hereunto set my hand and the seal of said circuit court, this twenty-sixth day of November, A. D. 1862.

H. W. FULLER, *Clerk.*

3 United States of America.

CIRCUIT COURT, U. S.,
Massachusetts District, ss:

To Elkanah Bangs and William H. Bangs, of Boston, in said district, merchants.

You are hereby cited and admonished to be and appear before the chief justice and associate justices of the Supreme Court of the United States on the first Monday of December, (A. D. 1862,) at Washington, the present seat of the national government, then and there to answer to a writ of error, this day sued out of the clerk's office of the circuit court of the United States for the first circuit and district of Massachusetts, wherein William T. Lowber and John R. Wilmer, of Philadelphia, and Frederic Lennig, of said Philadelphia, are plaintiffs in error, and you are defendants; to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

Witness the Hon. Roger B. Taney, chief justice of the Supreme Court of the U. S., at Boston, this twenty-first day of November, 1862.

NATHAN CLIFFORD,
Associate Jus. Sup. C. U. S., assign'd to 1st circuit.

We do hereby acknowledge due service of the within citation.

WM. H. BANGS,
ELKANAH BANGS,
By WM. H. BANGS.

4 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Wednesday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and sixty-two.

Before the honorable Nathan Clifford, associate justice, and the honorable Peleg Sprague, district judge.

ELKANAH BANGS *et al.*, plaintiffs,
vs.
WILLIAM T. LOWBER *et al.*, defendants.

5 *The commonwealth of Massachusetts, Suffolk, ss. to the sheriff of our county of Suffolk, or his deputy, greeting:*

[SEAL.]

We command you to attach the goods or estate of Lowber & Wilmer, of Philadelphia, in the State of Pennsylvania, copartners, doing business under the firm name of Lowber and Wilmer, and

Frederick Lennig, of said Philadelphia, merchant, to the value of twenty-five thousand dollars, and summon the said defendants, if they may be found in your precinct, to appear before our justices of our supreme judicial court, next to be holden at Boston, within and for our county of Suffolk, on the first Tuesday of April next, then and there in our said court to answer unto Elkanah Bangs and William H. Bangs, both of Boston, in said county of Suffolk, merchants and copartners, doing business under the firm name of E. Bangs
6 & Son, in an action of contract, to the damage of the said plaintiffs. (as they say,) the sum of twenty-five thousand dollars, which shall then and there be made to appear with other due damages. And whereas the said plaintiffs say that the said defendants have not in their own hands and possession goods and estate to the value of twenty-five thousand dollars aforesaid, which can be come at to be attached, but have intrusted to and deposited in the hands and possession of George Linder and George A. Meyer, both of Boston, in said county of Suffolk, merchants and copartners, doing business under the firm name of Linder & Meyer, trustees of the said defendants' goods, effects and credits, to the said value. We command you, therefore, that you summon the said George Linden and George A. Meyer, if they may be found in your
7 precinct, to appear before our justices of our said court to be holden as aforesaid, to show cause, if any they have, why execution to be issued upon such judgment as the said plaintiff may recover against the said defendants in this action, (if any,) should not issue against said goods, effects, or credits, in the hands and possession of them the said Linden & Meyer, trustees as aforesaid for the said defendants. And have you there this writ, with your doings therein.

Witness Lemuel Shaw, esquire, at Boston, the ninth day of January, in the year of our Lord one thousand eight hundred and sixty.

GEORGE C. WILDE, *Clerk.*

A true copy.
Attest: GEO. C. WILDE, *Clerk.*

COUNTY OF SUFFOLK, *ss:*

William H. Bangs, one of the plaintiffs in this writ, on oath
8 declare that the matter sought to be recovered in the action hereby commenced actually exceeds in amount or value the sum of four thousand dollars.

WM. H. BANGS.

Subscribed and sworn to this ninth day of January, A. D. 1860, before me,

GEORGE O. SHATTUCK,
Justice of the Peace.

The services thereon endorsed as follows:

SUFFOLK, *ss:*

BOSTON, *January 9th*, 1860.

By virtue hereof, I this day summoned the within named, Linder & Meyer, to appear and show cause at court, by reading this writ to said Linder at 2 m. past 3 o'clock p. m., and subsequently delivered to each of them an attested copy of this writ.

BENJ. F. BAYLEY,
Deputy Sheriff.

Serv. and tra	64
Copies	2 00
	2 64

SUFFOLK, *ss:*

BOSTON, *January 9th*, 1860.

By virtue of this writ, I this day attached twelve cases of indigo as the property of the within named Lowber and Wilmar, and Frederick Lenning.

BENJA. F. BAYLEY,
Deputy Sheriff.

Ser. and tra	1 54
Keeper's fees	14 00
Certif	20
	$15 74

And March 20, 1860, the within named defendants not being inhabitants of or residents in my presinct, and they having no tenant, agent, or attorney, duly accredited and known to me as such, within my presinct, I could make no further service on this writ.

BENJA. F. BAYLEY,
Deputy Sheriff.

Plaintiffs' declaration.

And the plaintiffs' say that the defendants made an agreement with the plaintiffs, in writing, called a charter-party, a copy of which is hereto annexed, and that the plaintiffs duly performed all and every of the covenants and agreements therein contained: and say, among other things, that the master of the vessel, mentioned in the agreement aforesaid, reported his said vessel to the defendants' agents at Calcutta, as being ready to receive cargo, according to the terms of said charter-party. But the defendants refused to provide and furnish to the said vessel at Calcutta a full and entire cargo of lawful merchandise, as was provided in the said

charter-party, or any part thereof. And the defendants also refused to pay to the plaintiffs or their agent, for the charter or freight of the said vessel, thirteen dollars per customary ton, and six dollars and a half for broken stowage, as was in said charter-party agreed.

11 "C."

This charter-party made and concluded upon in Boston, the fourth day of June, in the year one thousand eight hundred and fifty-eight, between E. Bangs & Son, owners of the ship Mary Bangs, of Boston, of the burthen of nine hundred and fifty-eight tons, or thereabouts, register measurement, now on her passage from New York to Melbourne, of the first part, and Frederick Lenning and Lowber & Wilmer, of Philadelphia, of the second part, witnesseth, that the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said party of the second part, do covenant and agree on the freighting and chartering of the said vessel unto the said party of the second part, for a voyage from Calcutta to Philadelphia, New York, or Boston, one port only, at charterer's option, orders to be
12 given the ship to proceed from Melbourne to Calcutta, before sailing from Calcutta, with all possible dispatch on the terms following, that is to say:

First. The said party of the first part do engage that the said vessel, in and during the said voyage, shall be kept tight, staunch, well fitted, tackled, and provided with every requisite, and with men and provisions necessary for such a voyage.

Second. The said party of the first part do further engage that the whole of said vessel (with the exception of the cabin, and the necessary room for the accomodation of the crew, and the stowage of the sails, cables, and provisions) shall be at the sole use and disposal of the said party of the second part during the voyage aforesaid; and that no goods or merchandise whatever shall be laden on board, otherwise than from the said party of the second part, or their
13 agent, without their consent, on pain of forfeiture of the amount of freight agreed upon for the same.

Third. The said party of the first part do further engage to take and receive on board the said vessel, during the aforesaid voyage, all such lawful goods and merchandise as the said party of the second part or their agents may think proper to ship. And the said party of the second part, for and in consideration of the covenants and agreements to be kept and performed by the said party of the first part, do covenant and agree with the said party of the first part to charter and hire the said vessel as aforesaid, on the terms following, that is to say:

First. The said party of the second part do engage to provide and furnish to the said vessel at Calcutta a full and entire cargo of lawful merchandise, sufficient saltpetre, or its equivalent, for bal-
14 last, what broken stowage the master may require, and the cargo assorted, that the ship may be loaded full and in a safe and seaworthy manner, and to a reasonable draft.

Second. The said party of the second part do further engage to pay to the said party of the first part or their agent, for the charter or freight of the said vessel during the voyage aforesaid, in manner following, that is to say :

Thirteen dollars per customary ton, for whole packages, weight and measurement, linseed sixteen hundred pounds to the ton, and half price, say six dollars and fifty cents per ton, for broken stowage. Charter payable on delivery of cargo in the United States. It is further agreed between the parties to this instrument that the said party of the second part shall be allowed for the loading and discharging of the vessel, at the respective ports aforesaid, lay
15 days as follows, that is to say: forty running days at Calcutta, to begin when the master reports his ship to charterers' agents as being ready to receive cargo, and good dispatch in discharging in the United States; and in case the vessel is longer detained, the said party of the second part agree to pay the said part of the first part demurrage at the rate of ninety dollars per day, day by day for every day so detained, provided such detention shall happen by default of the said party of the second part, or their agent. It is also further understood and agreed that the cargo or cargoes shall be received and delivered within reach of ship's tackles at the ports of loading and discharging. It is understood that the "Mary Bangs" is now on her passage from New York to Melbourne, sailed the third day of May last; that the owners will use the most direct
16 means to forward instructions to the master, with copy of this charter, ordering it to be fulfilled; but, should it so happen the ship should arrive at Melbourne before these instructions, and the master should have engaged his ship before receiving them, this charter will be void. Charterers agree to advance in Calcutta funds for the ordinary disbursements of the ship, should the captain require it at the cost of the same.

To the true performance of all and every of the foregoing covenants and agreements the said parties each to the other do hereby bind themselves, their heirs, executors, administrators, and assigns, (especially the said party of the first part the said vessel, her freight, tackle, and appurtenances; and the said party of the second part the merchandise to be laden on board,) each to the other, in the penal sum of twenty-four thousand dollars.

In witness whereof the said parties have hereunto interchangeably set their hands.

17 E. BANGS & SON.
LOWBER & WILMER.
FRED. LENNING.

Delivered in presence of—
BENJ'A. BRUCE.
H. WM. WORKMAN,
As to Lowber & Wilmer and
Fred. Lenning.

A true copy.

Attest : GEO. C. WILDE, *Clerk.*

Motion to amend writ.

And now the plaintiffs come and move to amend the writ in the above-entitled action, by inserting the full names of the defendants Lowber & Wilmer, as follows: William T. Lowber and John R. Wilmer, wherever their surnames occur in said writ, and the plaintiffs say, that at the time said writ was issued the full names of said defendants were unknown to plaintiffs.

CHANDLER & SHATTUCK,
For Plaintiffs.

Copy. Attest: GEO. C. WILDE, *Clerk.*

The above amendment was allowed by the court.
Attest: GEO. C. WILDE, *Clerk.*

18 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme judicial court—October term, 1860.

The above defendants appeared at this term of the court, and at the time of entering their appearance filed their petition that the same be removed to the circuit court of the United States for trial, and filed their bond with sureties, pursuant to the statute in that behalf provided, and thereupon it was ordered by the court that the same be removed accordingly.

Attest: GEO. W. NICHOLS, *Ass't Clerk.*

This action, removed as above mentioned from the supreme judicial court of the State of Massachusetts, was duly entered at the October term of this court, A. D. 1860, when and where the parties respectively appear by their respective counsel hereinafter named.

And it appearing that the pleadings are not in conformity
19 with the practice in this court, the court order that the plaintiffs reform their declaration in such a manner as to correspond with the practice in this court: Whereupon the said plaintiffs file their reformed declaration as follows, namely:

Declaration of a plea of trespass on the case on premises, for that whereas heretofore, to wit, on the fourth day of June, in the year of our Lord eighteen hundred and fifty-eight, at said Boston, by a certain charter party of affreightment, then and there made between the said plaintiffs, therein described to be the owners of the ship Mary Bangs, of Boston, of the burthen of nine hundred and fifty-eight tons, or thereabouts, register measurement, then on her passage from New York to Melbourne, of the first part, and the defendants therein described as of Philadelphia, of the second part, it was wit-
20 nessed, among other things, that the plaintiffs, in consideration of the covenants and agreements thereinafter contained to be kept and performed by the defendants, agreed on the freighting and

chartering of said vessel unto the defendants for a voyage from Calcutta to New York, Philadelphia, or Boston, one part only at charterer's option, orders to be given before sailing from Calcutta, the ship to proceed from Melbourne to Calcutta with all possible dispatch on the terms following, that is to say :

First. The said party of the first part engaged that the said vessel, in and during the said voyage should be kept tight, staunch, well fitted, tackled, and provided with every requisite, and with men and provision necessary for such voyage.

Second. The said party of the first part further engaged that the whole of said vessel, with the exception of the cabin and the necessary room for the accomodation of the crew, and the stowage
21 of the sails, cables, and provisions, should be at the sole use and disposal of the said party of the second part during the voyage aforesaid, and that no goods or merchandise whatever should be laden on board otherwise than from the said party of the second part, or their agent, without their consent, on pain of forfeiture of the amount of freight agreed upon for the same.

Third. The said party of the first part further engaged to take and receive on board the said vessel, during the aforesaid voyage, all such lawful goods and merchandise as the said party of the second part or their agent may think proper to ship.

And the said party of the second part for and in consideration of the covenants and agreements to be kept and performed by
22 the said party of the first part, covenanted and agreed with the said party of the first part to charter and hire the said vessel as aforesaid, on the terms following, that is to say:

First. The said party of the second part engaged to provide and furnish to the said vessel, at Calcutta, a full and entire cargo of lawful merchandise, sufficient saltpetre, or its equivalent, for ballast, what broken stowage the master may require, and the cargo assorted that the ship may be loaded full and in a safe and seaworthy manner, and to reasonable draft.

Second. The said party of the second part further engaged to pay to the said party of the first part or their agent, for the charter or freight of the said vessel during the voyage aforesaid, in manner following, that is to say, thirteen dollars p'r customary ton for whole packages, weight, and measurement, (linseed, sixteen hundred
23 pounds to the ton,) and half price, say six dollars and fifty cents p'r ton for broken stowage, payable on delivery of cargo in the United States.

It was further agreed between the parties to this instrument that the said party of the second part should be allowed, for the loading and discharging of the vessel at the respective ports aforesaid, lay days, as follows, that is to say: Forty running days at Calcutta, to begin when the master reports his ship to charterers' agents as being ready to receive cargo, and good despatch in discharging in United States.

And in case the vessel should be longer detained, the said party of the second part agree to pay to the said party of the first part

demurrage at the rate of ninety dollars per day, day by day, for every day so detained, provided such detention should happen by
24 default of the said party of the second part or their agent.

It is also further understood and agreed that the cargo or cargoes should be received and delivered within reach of ship's tackle sat the ports of loading and discharging.

It was understood that the "Mary Bangs" was, at the time of the making of the charter-party on which the present suit is brought by the said plaintiffs, on her passage from New York to Melbourne, (having sailed the third day of May, in the year of our Lord one thousand eight hundred and fifty-eight,) that the owners would use the most direct means to forward instructions to the master with copy of this charter, ordering it to be fulfilled; but that if it should so happen that the ship should arrive at Melbourne before their in-
25 structions, and that the master should have engaged his ship before receiving them, this charter would be void. The charterers agreed to advance, in Calcutta, funds for the ordinary disbursements of the ship, should the captain require it, at the cost of the same.

To the true performance of all and every of the foregoing covenants and agreements the said parties each to the other did hereby bind themselves, their heirs, executors, administrators and assigns, (especially the said party of the first part, the said vessel, her freight, tackle, and appurtenances, and the said party of the second part, the merchandise to be laden on board,) each to the other in the penal sum of twenty-four thousand dollars.

In witness whereof they did thereunto interchangeably set their hands.

26 And the said charter-party of affreightment being so made as aforesaid, afterwards, to wit, on the day and year first aforesaid, to wit, at said Boston, in consideration thereof, and that the said plaintiffs, at the special instance and request of the said defendants, had then and there undertaken and faithfully promised the said defendants to perform and fulfil the said charter-party of affreightment in all things on their part and behalf to be performed and fulfilled ; and the said plaintiffs, in fact, say, that said ship, within a reasonable time after the making of the said charter-party, arrived at said Melbourne, to wit, on August 7, 1858 ; that the plaintiffs, immediately after the making of the said charter-party, used great care and diligence and the most direct means to send notice of the
27 making of the said charter-party and of the agreements therein contained, and a copy of the same, ordering the same to be fulfilled, to the captain of the said ship, Mary Bangs ; but that the said ship, having discharged her cargo at Melbourne, sailed from thence for Manilla on a certain day, to wit, on September 16, 1858, before said notice of said charter-party had reached or could have reached said Melbourne, and that said captain of said ship being entirely ignorant of the making of the said charter-party ; that the said ship arrived at Manilla in due time and after a reasonable voyage, to wit, on November 6, 1858 ; that, at Manilla, on January 20, 1859, the

said captain of said ship first received notice of the charter-party aforesaid, by letter from the plaintiffs; that thereupon said
28 captain immediately got the said ship ready for sea, and sailed from said Manilla for Calcutta, on January 24, 1859; that said ship arrived at Calcutta in due time and after a reasonable voyage, to wit, on February 26, 1859, in good order and condition perfectly to perform the voyage to the United States, according to the terms of the charter-party aforesaid, and in good season and sufficiently early by the custom of the trade and of merchants to perform said voyage, according to the true intent and meaning of the charter-party aforesaid; that said captain immediately at said Calcutta offered said ship to the defendants, for them to load the same, as by the stipulations of the charter-party aforesaid; but that the defendants refused to load and dispatch the said ship, claiming that the said charter-
29 party was null and void; and the said plaintiffs say that although they have always performed and fulfilled all things in the said charter-party mentioned, on their part and behalf to be performed and fulfilled, to wit, at Calcutta aforesaid; and although the said ship, Mary Bangs, was at Calcutta aforesaid, on the 26th day of February, 1859, as aforesaid, tight, staunch, strong, and every way properly fitted, victualled, and manned, with all things needful and necessary, as was usual for vessels in the merchants' service, and for the voyage in the said charter-party mentioned; and that the said captain of said ship was then and there ready and willing to receive a cargo of such lawful goods, wares, and merchandise, as said
30 defendants ought, according to the charter-party aforesaid, to have tendered for the said vessel, to wit, at Calcutta, on February 26, 1859, as aforesaid; yet the defendants, not regarding their promise and undertaking, but contriving and intending to deceive and defraud the plaintiffs in this behalf, did not load the said ship for the voyage mentioned in the charter-party aforesaid, according to the terms of the said charter-party, or in any other manner, contrary to their said promise and undertaking as aforesaid, to the damage of the plaintiffs of the sum of twenty thousand dollars, and therefore they bring their suit.

CHANDLER & SHATTUCK,
Attorneys for plaintiffs.

And the said parties submit to this hon'ble court their agreed statement of facts, as follows, to wit:

31 CIRCUIT COURT OF THE UNITED STATES,
District of Massachusetts, ss:

E. BANGS *et al. vs.* LOWBER *et al.*

Agreed statement of facts.

This is an action of assumpsit, in which the plaintiffs seek to recover damages for the breach of the contract therein set forth.

The contract, a copy of which is annexed, and marked "A," was

executed by the defendants, in Philadelphia, on the ninth day of June, A. D. 1858, and was received by the plaintiffs, in Boston, on the eleventh day of said June. The ship Mary Bangs was then owned by the following-named persons: Elkanah Bangs and William H. Bangs, the plaintiffs; Alfred Somes, B. F. Seabury, and Hastel Crosby. The plaintiffs, a firm consisting of Elkanah Bangs and William H. Bangs, doing business under the name of E. Bangs and Son, were the managing owners and the ship's husbands.

Said vessel sailed from New York on the third day of May, A. D. 1858, under the command of Alfred Somes, for Melbourne, in Australia, with a full general cargo, more than half of which was lumber. She arrived at Melbourne on the seventh of August, 1858. Her cargo was all discharged about the first of September, and she was ready to sail about the seventh of September. The master waited for the mail until the sixteenth, and then sailed, passing Port
32 Philip Head on the eighteenth. No mail arrived at Melbourne while said vessel was there; and the latest date from the United States, when said vessel sailed, was May 14th; the Australasian, the steamship which transported the overland mail from Europe, which was due on the fifth of September, having met with an accident, so that no mail arrived until the tenth of October. The Mary Bangs, on the day before named, sailed for Manilla, seeking business. She arrived there on the sixteenth of November, A. D. 1858; and the master endeavored constantly to obtain freight or business for her until the twentieth of January following. The said vessel was not at any time engaged, from the time of her arrival at Melbourne up to the twentieth of January, 1859; when the master received a letter from the plaintiffs, a copy of which is hereto annexed, and marked "B." That letter came by the mail-boat from Hong Kong, by way of Singapore, but was not addressed to him as being at Melbourne. On the receipt of this letter, the master got his vessel ready for sea, and sailed on the twenty-fourth of January for Calcutta, and arrived at the town on the twenty-sixth of February. Before leaving Manilla, on the twenty-fourth of January, the master addressed a letter to William L. Wilmer, the defendants' agent in Calcutta, a copy of which is hereto annexed, and marked "C;" which letter was not received by said William L. Wilmer till after the arrival of the Mary Bangs. On the day the Mary Bangs arrived at Calcutta, the master called on Mr. Wilmer, and had a conversation with him; and he declined loading the ship. The master told him he was ready to receive the cargo; and Wilmer replied, the charter was null. In one interview with the master, Wilmer assigned, as the reason why the charter was null, that the Mary Bangs did not come direct from Melbourne. On the twenty-eight of February, the master wrote to Mr. Wilmer the letter hereto annexed, and marked "D;" and received in reply the letter, a copy of which is hereto annexed, and marked "E." At this time, the Mary Bangs was in good order for any voyage. After the execution of
33 the charter-party, the plaintiffs, on the same day it was received in Boston, forwarded instructions to the master, with

a copy of the charter, ordering it to be fulfilled, by a ship which sailed from New York to Melbourne, June 16, 1858. June 15, 1858, another letter was sent by the plaintiffs to the master at Melbourne, by the overland mail by way of Europe, ordering the master to proceed to Calcutta, and comply with the terms of the charter. A copy is hereto annexed, and marked "F." The overland mail left England on the 12th and 16th of each month for Melbourne, and was due at Melbourne in about fifty or sixty days from that time. The Australasian, which carried the mail which left England in July, 1858, broke down; so that the first overland mail which arrived in Australia, after the plaintiffs' letter was sent, was the one which left England in August, and arrived at Melbourne Oct. 10, 1858. There were no more direct means for forwarding instructions to Melbourne than those used by the plaintiffs. The plaintiffs sent several other letters, instructing the master to perform the charter to Melbourne by other conveyances; and also sent copies of the same letters to Singapore and Batavia, one of which was received by the master at Manilla. The plaintiffs sent, besides the above-described letters, certain other letters to the master of the Mary Bangs at Melbourne, notifying him of the charter, at the following dates, and by the following routes:—

June 22, 1858, by the ship Expounder.
June 19, " " " Alma.
June 9, " " " Kitty Simpson.

The last mentioned was written before they received the charter, when they were informed by telegraph that it had been executed by the defendants. All of the above letters may be referred to.

A letter enclosing the charter was also sent by the plaintiffs to Calcutta, addressed to the master, and was received by the master on his arrival there. This was the first time the master had seen the charter.

Besides the Mary Bangs, the defendants chartered the John P. Wheeler and the William Cummings at about the same time, and upon the same voyage from Calcutta to the United States. The J. P. Wheeler was on a voyage from Liverpool to Calcutta, and the William Cummings was at Callao, waiting orders, at the time they were chartered.

The voyage from New York to Melbourne usually occupies from ninety to one hundred and thirty days; and from two to six weeks is required for the discharge at Melbourne of such a cargo as the Mary Bangs had on the voyage to that place, and for getting ready to sail. The voyage from Melbourne to Calcutta, at the time of the year the Mary Bangs sailed from Melbourne, usually occupies from forty-five to sixty days.

The master of the Mary Bangs went to Melbourne with the cargo aforesaid, with verbal instructions to seek business, and do the best he could in getting freight for the vessel at Melbourne or elsewhere; and to remit the sums received for freight to Messrs. Baring Bros. & Co., of London.

After the charters of the three vessels were made, William L. Wilmer, the defendants' agent, on the 22d or 23d of June, 1858, sailed from New York for Calcutta by the overland route, provided with funds to load those three vessels. He arrived out on the 25th of August, 1858; and remained there till Jan. 23, 1861. On or about Nov. 20, 1858, he heard, by a vessel which left Melbourne after the Mary Bangs sailed, that she had gone to Guam, a small island near Manilla; and, on the 27th of November, he wrote the defendants that, the Mary Bangs having deviated from the voyage, should she arrive thereafter, he should consider himself at liberty to throw up the charter. The defendants, having received information that the Mary Bangs had sailed for Manilla, sent to William L. Wilmer
35 a letter, a copy of which is hereto annexed, and marked "G." This letter was received by said Wilmer before the arrival of the Mary Bangs.

In November, after said Wilmer's arrival in Calcutta, he began to purchase certain parts of the cargoes for the chartered ships; purchasing first for the William Cummings and Mary Bangs, but not for the Wheeler, because he knew it would take at least six weeks to discharge her outward cargo at Calcutta; which would give sufficient time to purchase a cargo for her. The Wheeler arrived on the fourth of November, before either of the others. Before the William Cummings arrived, which was on the first of December, 1858, said Wilmer had purchased of certain articles enough for two ships; of linseed and gunny-cloth enough to load a ship and a half, but had not purchased any saltpetre, although that goes into the bottom of the ship, and is the part of the cargo usually first purchased. All the merchandise which was purchased before the arrival of the Mary Bangs was shipped on board the William Cummings and the J. P. Wheeler; but a part of the cargo, which was purchased before Nov. 20, was intended for the Mary Bangs, and, had she arrived at any time before the end of December, a part of the cargo shipped on the other vessels would have been shipped on her, and she could have been loaded during her lay-days. The J. P. Wheeler cleared on Feb. 4, and sailed Feb. 7; the William Cummings cleared Jan. 26, and sailed Feb. 5. After the arrival of the Mary Bangs, and after said Wilmer had refused to load her, and she had been chartered for another voyage, said Wilmer chartered the South Shore, a vessel of about the same tonnage with the Mary Bangs, to take the place of the Mary Bangs, and loaded her with the funds provided to purchase a cargo for the Mary Bangs. The whole cargo of the South Shore was purchased after the arrival of the Mary Bangs. When the defendants refused to load the Mary Bangs, freights from Calcutta to New York were about five dollars per ton, and to Philadelphia about five and a half.

36 Each of the above facts is agreed to, without admitting its competency as to the case, or that it is entitled to admission or any legal effect; and each party is at liberty to argue that any fact above agreed to be true is not admissible, and cannot lawfully affect the legal decision of the case.

If, upon the foregoing facts, the plaintiffs are not entitled to maintain their action, judgment is to be entered for the defendants ; but, if the court are of opinion that they can maintain this action, then an assessor is to be appointed by the court, and judgment is to be entered for the plaintiffs for such amount as he shall report due to the plaintiffs, under the instructions of the court.

E. BANGS & SON.
A. H. FISKE, *Att'y to Def'ts.*

B.

(Copy.)

BOSTON, *July* 27, 1858.

CAPT. SOMES :

DEAR SIR : The object of this is to inform you that we have chartered the Mary Bangs, to load at Calcutta for the United States, at thirteen dollars per ton. The charterers are Philadelphia folks, and we think you will be likely to be ordered there. Ship pays port charges. Forty running days at Calcutta, to commence when the master reports his ship to charterers' agent as being ready to receive cargo. The charter-party contains the following important clause :

"It is understood the Mary Bangs is on her passage to Melbourne, [sailed 3d May last;] that the owners will use the most direct means to forward instructions to the master, with copy of this char-
37 ter-party, ordering it to be fulfilled; but should it so happen the ship should arrive at Melbourne before these instructions, and the master should have engaged his ship before receiving them, this charter shall be void."

You will observe that, if you have not engaged the ship previous to receiving information that we have chartered her, she is bound by our charter, and you will proceed to Calcutta to load under it.

You are to load at Calcutta a full and entire cargo of lawful merchandise; sufficient saltpetre, or its equivalent, for ballast; what broken stowage the master may require; and the cargo assorted, that the ship may be loaded full, and in a safe and seaworthy manner, and to a reasonable draft.

The charter-party we will forward you at Calcutta, to care Messrs. Wm. L. Wilmer & Co., on whom you will call.

This charter was agreed on about the fourth June. We understand ships can now be chartered for about ten $\frac{50}{100}$ths dollars. We shall send a duplicate of this to Batavia.

We have written several letters previous to this, *via* England and sailing ships.

Yours, resp'y,
(Signed) E. BANGS & SON.

C.

MANILLA, *Ja*

To Messrs. WM. WILMER & Co.

GENTLEMEN: By the mail from Hong Kong, arrived 20th inst., I received instructions from Messrs. E. Bangs owners of ship Mary Bangs, that they had chartered the M. load at Calcutta for the United States, and for me to proceed dir[to that port, and call on you; which I am now about ready to do, and shall sail to-night, if not prevented unavoidably, or soon after as possible.

Most respectfully yours,

ALFRED SOMES,
Master of ship Mary Bangs.

38 D.

CALCUTTA, *Feb. 28th*, 1859.

To WM. L. WILMER.

D'R SIR: I beg to inform you that the ship Mary Bangs is now in port, and ready to receive cargo, and fulfil the charter-party made at Boston by Mess. E. Bangs & Son, owners of said ship, and Mess. Frederick Lennig and Lowber and Wilmer of Philadelphia.

Please inform me if you are the charterers' agent, if so, I wait your orders concerning the cargo, &c.

Most respectfully yours,

ALFRED SOMES,
Master of ship Mary Bangs.

E.

CALCUTTA, *28th Feb.*, 1859.

DEAR SIR: In reply to your letter of this date, announcing the arrival of the ship "Mary Bangs" in this port, and wishing to know if I am the authorized agent of Mess. Lowber and Wilmer and Frederick Lennig of Philadelphia, I beg to state that I am their acknowledged agent here, and, as such, must decline loading your ship under charter-party made and dated at Boston 4th June, 1858.

I remain, dear sir, yours truly,

WM. L. WILMER.

To Capt. ALFRED SOMES,
Commanding ship "Mary Bangs."

39 F.

Capt. ALFRED SOMES.

BOSTON, *June* 15, 1858.

DEAR SIR: The object of this is to inform you that we have chartered the Mary Bangs to load at Calcutta for the United States; therefore,

If, upon the foregoing facts, the plaintiffs are not entitled to maintain their action, judgment is to be entered for the defendants ; but, if the court are of opinion that they can maintain this action, then an assessor is to be appointed by the court, and judgment is to be entered for the plaintiffs for such amount as he shall report due to the plaintiffs, under the instructions of the court.

E. BANGS & SON.
A. H. FISKE, *Att'y to Def'ts.*

B.

(Copy.)

BOSTON, *July* 27, 1858.

CAPT. SOMES :

DEAR SIR : The object of this is to inform you that we have chartered the Mary Bangs, to load at Calcutta for the United States, at thirteen dollars per ton. The charterers are Philadelphia folks, and we think you will be likely to be ordered there. Ship pays port charges. Forty running days at Calcutta, to commence when the master reports his ship to charterers' agent as being ready to receive cargo. The charter-party contains the following important clause :

"It is understood the Mary Bangs is on her passage to Melbourne, [sailed 3d May last;] that the owners will use the most direct means to forward instructions to the master, with copy of this char-
37 ter-party, ordering it to be fulfilled; but should it so happen the ship should arrive at Melbourne before these instructions, and the master should have engaged his ship before receiving them, this charter shall be void."

You will observe that, if you have not engaged the ship previous to receiving information that we have chartered her, she is bound by our charter, and you will proceed to Calcutta to load under it.

You are to load at Calcutta a full and entire cargo of lawful merchandise; sufficient saltpetre, or its equivalent, for ballast; what broken stowage the master may require; and the cargo assorted, that the ship may be loaded full, and in a safe and seaworthy manner, and to a reasonable draft.

The charter-party we will forward you at Calcutta, to care Messrs. Wm. L. Wilmer & Co., on whom you will call.

This charter was agreed on about the fourth June. We understand ships can now be chartered for about ten $\frac{50}{100}$ths dollars. We shall send a duplicate of this to Batavia.

We have written several letters previous to this, *via* England and sailing ships.

Yours, resp'y,
(Signed) E. BANGS & SON.

To Manila

C.

MANILLA, *Jan. 24th*, 1859.

To Messrs. WM. WILMER & Co.

GENTLEMEN: By the mail from Hong Kong, arrived here on the 20th inst., I received instructions from Messrs. E. Bangs & Son, owners of ship Mary Bangs, that they had chartered the M. B. to load at Calcutta for the United States, and for me to proceed directly to that port, and call on you; which I am now about ready to do, and shall sail to-night, if not prevented unavoidably, or soon after as possible.

Most respectfully yours,

ALFRED SOMES,
Master of ship Mary Bangs.

38 D.

CALCUTTA, *Feb. 28th*, 1859.

To WM. L. WILMER.

D'R SIR: I beg to inform you that the ship Mary Bangs is now in port, and ready to receive cargo, and fulfil the charter-party made at Boston by Mess. E. Bangs & Son, owners of said ship, and Mess. Frederick Lennig and Lowber and Wilmer of Philadelphia.

Please inform me if you are the charterers' agent, if so, I wait your orders concerning the cargo, &c.

Most respectfully yours,

ALFRED SOMES,
Master of ship Mary Bangs.

E.

CALCUTTA, *28th Feb.*, 1859.

DEAR SIR: In reply to your letter of this date, announcing the arrival of the ship "Mary Bangs" in this port, and wishing to know if I am the authorized agent of Mess. Lowber and Wilmer and Frederick Lennig of Philadelphia, I beg to state that I am their acknowledged agent here, and, as such, must decline loading your ship under charter-party made and dated at Boston 4th June, 1858.

I remain, dear sir, yours truly,

WM. L. WILMER.

To Capt. ALFRED SOMES,
Commanding ship "Mary Bangs."

39 F.

Capt. ALFRED SOMES.

BOSTON, *June* 15, 1858.

DEAR SIR: The object of this is to inform you that we have chartered the Mary Bangs to load at Calcutta for the United States; therefore,

if you have not engaged the ship, you will proceed to Calcutta from Melbourne, and comply with the terms of the charter-party which we shall send to Calcutta. The price is $13 per ton; charterer having the privilege of Boston, New York, or Philadelphia. The charterers being Philadelphia folks, we think you will be sent there. Ship pays port charges. We have made this charter on condition that you have not engaged the ship when you receive this information. Consignee in Calcutta, probably Wm. F. Wilmer. This we send *viâ* England. Have written by sailing-vessel. Business very dull.

Y'rs, resp'y,

(Signed) E. BANGS & SON.

G.

Mr. Wm. L. Wilmer.

Philad. *Decr.* 7, 1858.

Dr. Sir: Since we last wrote you, we have to acknowledge receipt of yours of Oct. 9th.

The last mail brought us intelligence of the sailing of the Mary Bangs from Melbourne for Guam, before the arrival of the charter-party which had been forwarded to the former place. We consider it a fortunate circumstance, so far as we are concerned; since freight can be obtained so much lower in Calcutta. The departure of the ship, of course, nullifies the engagement we are under to take her; as, in conformity with the charter, she was to proceed direct to Calcutta from Melbourne; and we have notified the owner of the ship to that effect.

You will, therefore, when you think it judicious, invest the funds intended for the purchase of a cargo for the "Mary Bangs" in the purchase of a cargo, to be forwarded by any good vessel that can be obtained at the lowest freight you can get. You will, of course, exercise your best judgment as to the best time to secure a ship and cargo that you think will do to send us. There has been no material change in the market for Calcutta goods since we last wrote you. We hope you will inform us, when you next write, if there is anything here you would like us to send you. We have not forwarded you any papers, as you have not expressed, in any of your letters, a desire for any; and we suppose, when you were last here, that you had subscribed to some, to be forwarded direct. Hoping soon to be in receipt of further information from you, we remain,

Yours, very truly,

LOWBER & WILMER.

A.

"CABOTS."

(*The parts in brackets were written.*)

This charter party, made and concluded upon in [Boston,] the [fourth] day of [June,] in the year one thousand eight hundred and [fifty-eight,] between [E. Bangs & Son, owners,] of the [ship Mary Bangs,] of [Boston,] of the burthen of [nine hundred and fifty-eight] tons, or thereabouts, register measurement [on her passage from New York to Melbourne,] of the first part, and [Frederick Lennig & Lowber & Wilmer, of Philadelphia,] of the second part, witnesseth, that the said part[y] of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by the said part[y] of the second part, do covenant
41 and agree on the freighting and chartering of the said vessel unto the said part[y] of the second part, for a voyage [from Calcutta to Philadelphia, New York, or Boston, one port only, at charterer's option; orders to be given before sailing from Calcutta. Ship to proceed from Melbourne to Calcutta with all possible despatch] on the terms following; that is to say:

First. The said part[y] of the first part do engage that the said vessel, in and during the said voyage, shall be kept tight, stanch, well fitted, tackled and provided with every requisite, and with men and provisions necessary for such voyage.

Second. The said part[y] of the first part do further engage, that the whole of said vessel, with the exeeption of the cabin, and the necessary room for the accommodation of the crew, and the stowage of the sails, cables, and provisions, shall be at the sole use and disposal of the said part[y] of the second part, during the voyage aforesaid; and that no goods or merchandise whatever shall be laden on board, otherwise than from the said part[y] of the second part, or [their] agent, without [their] consent, on pain of forfeiture of the amount of freight agreed upon for the same.

Third. The said part[y] of the first part do further engage to take and receive on board the said vessel, during the aforesaid voyage, all such lawful goods and merchandise as the said part[y] of the second part, or [their] agents, may think proper to ship.

And the said part[y] of the second part, for and in consideration of the covenants and agreements to be kept and performed by the said part[y] of the first part, do covenant and agree with the said part[y] of the first part to charter and hire the said vessel as aforesaid, on the terms following, that is to say:

42 First. The said part[y] of the second part do engage to provide and furnish to the said vessel, [at Calcutta, a full and entire cargo of lawful merchandise; sufficient salpetre, or its equivalent, for ballast: what broken stowage the master may require; and

the cargo assorted, that the ship may be loaded full, and in a safe and seaworthy manner, and to a reasonable draft.]

Second. The said part[y] of the second part do further engage to pay to the said part[y] of the first part, or [their] agent, for the charter or freight of the said vessel during the voyage aforesaid, in manner following, that is to say: [Thirteen dollars per customary ton for whole packages, weight and measurement (linseed, sixteen hundred pounds to the ton;) and half price, say six dollars and fifty cents per ton, for broken stowage. Charter payable on delivery of cargo in the United States.]

It is further agreed between the parties to this instrument, that the said part[y] of the second part shall be allowed, for the loading and discharging of the vessel at the respective ports aforesaid, lay days as follows, that is to say: [Forty running days at Calcutta, to begin when the master reports his ship to charterers' agent as being ready to receive cargo; and good despatch in discharging in United States.] And, in case the vessel is longer detained, the said part[y] of the second part agree to pay to the said part[y] of the first part demurrage at the rate of [ninety] dollars per day, day by day, for every day so detained, provided such detention shall happen by default of the said part[y] of the second part or [their] agent.

It is also further understood and agreed, that the cargo or cargoes shall be received and delivered [within reach of ship's tackles] at the ports of loading and discharging.

[It is understood that the "Mary Bangs" is now on her pas-
43 sage from New York to Melbourne, (sailed 3d day May last;) that the owners will use the most direct means to forward instructions to the master, with copy of this charter, ordering it to be fulfilled; but should it so happen the ship should arrive at Melbourne before these instructions, and the master should have engaged his ship before receiving them, this charter will be void. Charterers agree to advance, in Calcutta, funds for the ordinary disbursements of ship, should the captain require it, at the cost of the same.]

To the true performance of all and every of the foregoing covenants and agreements, the said parties, each to the other, do hereby bind themselves, their heirs, executors, administrators and assigns (especially the said part[y] of the first part, the said vessel, her freight, tackle, and appurtenances; and the said part[y] of the second part, the merchandise to be laden on board,) each to the other, in the penal sum of [twenty-four thousand] dollars.

In witness whereof, the said parties have hereunto interchangeably set their hands.

E. BANGS & SON.
LOWBER & WILMER.
FRED'K LENNIG.

Delivered in presence of—
BENJ. BUNCE.
H. WM. WORKMAN, as to
LOWBER & WILMER & FRED'K LENNIG.

44 The case was thence continued from term to term to the May term of this court, A. D. 1862, when, the honorable Nathan Clifford presiding, the case was set down for hearing and finally heard by the court. The same was thence continued to this present term. And now, after mature deliberation thereon had, and a full consideration of all the facts set forth, the court "are of opinion that the plaintiffs can maintain this action;" and the said parties having waived so much of their stipulation as relates to the appointment of an assessor, and mutually agreeing that the court may determine the amount of damages without the intervention of such assessor.

It is thereupon considered by the court that said Elkanah Bangs and William H. Bangs and Frederick Lennig recover of said William Lowber and John R. Wilmer, the defendants, the sum of nineteen thousand five hundred and sixty-two dollars and twenty-seven
45 cents ($19,562 27) damages, and their costs of court, taxed at one hundred and forty-one dollars and sixty cents, ($141 60,) and said George Linder and George A. Meyer, summoned as trustees in the plaintiffs' writ, being solemnly called to come into court and answer, do not appear but severally make default, it is thereupon ordered by the court that execution issue upon this judgment against the said principal defendants and against their goods, effects, and credits in the hands and possession of them, the said Linden and Meyer, trustees as aforesaid.

A true record. Attest:

H. W. FULLER, *Clerk.*

46 UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, Henry W. Fuller, clerk of the circuit court of the United States for the first circuit, Massachusetts district, do hereby certify that the foregoing is a true copy of the record and all proceedings in the cause of Elkanah Bangs *et al. vs.* Wm. T. Lowber *et al.* in this court.

In testimony whereof I have hereunto subscribed my name and [SEAL.] affixed the seal of said court, at Boston, in said district, this twenty-ninth day of November, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-seventh.

H. W. FULLER, *Clerk.*

Filed December 6, 1862.

SUPREME COURT OF THE UNITED STATES.

[No. 186.]

LOWBER ET AL. *vs.* BANGS ET AL.

POINTS AND AUTHORITIES FOR PLAINTIFFS IN ERROR.

SUPREME COURT OF THE UNITED STATES.

[No. 186.]

LOWBER ET AL. *vs.* BANGS ET AL.

POINTS AND AUTHORITIES FOR PLAINTIFFS IN ERROR.

THIS action is assumpsit by Defendants in error against Plaintiffs in error, founded on the charter, by said Defendants to Plaintiffs, of the ship "Mary Bangs," by a charter party executed at Boston, and dated June 9, 1858. The claim of Defendants in error is to recover of Plaintiffs damages for a refusal to furnish a cargo for the ship at Calcutta, to be transported to the United States, in conformity, as is alleged, with the charter party. The case was submitted to the Court below upon an agreed statement of facts, set forth in the Record (p. 10), and the judgment of the Court, in favor of the Defendants in error, is subjoined.

The charter party, pp. 17–18, declares, in manuscript (the body of it being printed), that it is understood that the "Mary Bangs" "is now on her passage from New York to Melbourne;" and further, in the same manner, that she "sailed 3d day of May last," that "ship to proceed from Melbourne to Calcutta *with all possible despatch*" (p. 17), and "that the owner will use the most direct means to forward instructions to the master, with copy of this charter, ordering it to be fulfilled, but *should it so happen the ship should arrive at Melbourne before these instructions, and the master should have engaged his ship before receiving them, this charter will be void*" (p. 18).

The ship arrived at Melbourne, August 7, 1858 (p. 11). The master, having received no advices of this charter, "sailed for Manilla, *seeking business*," on the 16th September (p. 11); arrived there 16th November; lay there, endeavoring to obtain freight or business, *until 20th January*, 1859, when he received from his owners the letter marked *B* (p. 14), "by mail boat from Hong Kong by way of Singapore, *not addressed to him as being at Melbourne*" (p. 11), and which, with its date and real purpose,

will be adverted to hereafter. After the receipt of this letter, viz., on the 24th of January, the ship sailed for Calcutta, and arrived there 26th February. The master tendered his ship to the agent of Plaintiffs to be laden, who refused her, and declared the charter null. If the question of diligence of Defendants, or the effect of laspe of time upon the rights and interests of Plaintiffs, shall ever become material, the facts that bear thereon will be noted hereafter.

I.

The practical questions in this case are two: —

1st. Did both parties understand that if, before advice of this charter reached the master, the ship had left Melbourne seeking business according to his original instructions, in any of the commercial ports of the world, this contract was at an end? or did they contemplate that whensoever or wheresoever notice of this charter should reach the master, whether engaged in other business or not, all his pending engagements were to be terminated and his ship forthwith proceed to execute this charter, at the peril of his owners being liable for a breach of it?

2d. If the former was the real intent of the parties, is there any legal rule of construction which, applied to the language of the contract, intervenes and compels the Court to defeat that intent?

II.

The answer to both these questions is to be found by looking to the surrounding circumstances, — the position and conduct of the parties when and immediately after the contract was made, by an analysis of that contract, to find not merely what it expresses, but what it omits, — which is inconsistent or consistent with one or the other view of its construction; and, finally, with these aids, by the application to it of the settled rules of construction. And —

1st. The position of the parties at the date of the contract was one entirely consistent with the view that both of them might naturally intend that the contract should be null if the

vessel had left Melbourne before advices reached there. The owners of the ship had already given orders to the master, after discharging his cargo at Melbourne, to "seek business, and do the best he could in getting freight for his vessel at Melbourne or *elsewhere*" (Record, p. 12), under which he ultimately, in fact, sailed "for Manilla, seeking business" (Record, p. 11). No new orders, therefore, would be required from his owners in case notice of this charter failed to reach him. On the other hand, the charterers immediately despatched an agent, with funds, to load three vessels (Record, p. 13); and they would naturally desire to have the contingency promptly settled, whether this charter party was to be effective, by making its validity depend upon the fact that the ship had or not left Melbourne, — since otherwise they would be obliged to keep their agent at Calcutta for an entirely indefinite time.

2d. The contemporaneous conduct of the owners as distinguished from their subsequent action (after circumstances had changed) tends to show conclusively their construction of the contract. If they understood that the charter would bind their ship should she have left Melbourne, the instructions to the master, which they were bound by the charter "to use the most direct means to forward," must, from necessity, have stated what course he was to take, under the various circumstances in which he might be placed when notice reached him after leaving Melbourne. Their letters, as shown by the Record (p. 12), were as follows: One sent the day they received the charter, by vessel which "sailed the 16th June, with a copy of the charter, ordering it to be fulfilled;" "one dated 15th June, sent by overland mail by way of Europe, ordering the master to proceed to Calcutta, and comply with the terms of the charter," — of this letter copy *F* is in the Record (p. 15). The Plaintiffs sent, besides, "certain other letters to the master of the 'Mary Bangs,' *at Melbourne*" (p. 12), notifying him of the charter, by sailing vessels, viz., 22d, 19th, and 9th of June. *All these letters were directed to Melbourne.* Copy of one only, of all these letters, is produced (*F*, p. 15), and that letter (the one sent to Melbourne by overland mail) contains not one word of instructions founded on the view that the charter might take effect after the departure of the ship from Melbourne, "seeking business."

So much for the contemporaneous letters. But after the lapse of nearly two months from the date of the charter, circumstances had changed; freights as they say in the letter to the master, now to be referred to, had fallen. "We have chartered the 'Mary Bangs,' to load at Calcutta, at thirteen dollars per ton. We understand that ships can now be chartered at about ten $\frac{5\,0}{1\,0\,0}$ dollars." Accordingly, on the 27th of July (Record, p. 14, *B*), they wrote the master the letter above referred to, which was the first notice that reached him, and which was sent to Singapore, and went to Manilla "by the mail boat from Hong Kong by way of Singapore." Of this letter they say they "shall send duplicate to Batavia;" and in it they give an extraordinary construction to the charter party suited to their then interests, viz: "You will observe that if you have not engaged your ship *previous to receiving information that we have chartered her* she is bound by our charter, and you will proceed to Calcutta." This was ingenious. The charter party provided if it should so happen the ship should *arrive at Melbourne before these instructions, and the master should have engaged his ship before receiving them, the charter will be void.*" The owners' exposition of it, in this letter, is, that if notice reached the master, at whatever distance of time or place, before he was engaged, the charter was to attach. What construction they would have put upon it had freights risen instead of falling does not appear.

On the part of the charterers, their contemporaneous conduct is consistent with the view that the charter was contingent on advices reaching Melbourne in season; and the letter of their agent, on learning that the ship had left Melbourne for Guam (Record, p. 13) (at which period it does not appear that freights had fallen), shows his view that the contract was not binding on the charterers. The letter of the charterers in December, 1858, when they learned that the ship had left Melbourne (Record, p. 16, *G*), although after freights have fallen, expresses the same view.

3d. Next, an analysis of the contract will show, by what it expresses, without looking to what it omits, that both parties contemplated that the departure of the ship before advices reached Melbourne rendered the contract null.

The earliest clause in the contract is, "ship to proceed from

Melbourne to Calcutta with all possible despatch." *From Melbourne*, not from Manilla, or any other port in the eastern seas in which she might at any time be found. "With all possible despatch," that is to say, direct from Melbourne to Calcutta. The legal effect of this language, as a condition, will be adverted to hereafter; but, aside from technicalities, do they leave a doubt that both parties contemplated that the contract should apply only to a vessel at Melbourne?

The next, and only other important clause is this: "It is understood that the 'Mary Bangs' is now on her passage from New York to Melbourne (sailed 3d May last), that the owners will use the most direct means to forward instructions to the master, with copy of the charter, ordering it to be fulfilled; but should it so happen that the ship should arrive at Melbourne before these instructions, and the master should have engaged his ship before receiving them, this charter will be void" (Record, p. 18).

Now this clause, both by the provisions which it makes that the owners shall use the most "direct means to forward instructions to the master," as well as by the provision that although the ship might not have left Melbourne, yet she should not be bound by it if there but already engaged, shows the intent of the parties. Consider what is meant by the words "most direct means to forward instructions." Were they to be forwarded to all parts or places where the ship might probably be bound, if she had left Melbourne? If so, why was it not expressed?

It is clear, from the whole charter party, as well as from the conduct of the parties, that the place which the most "direct means" were to be used to reach was Melbourne, and that only; and all the owners' letters of instruction, as shown above, were (until circumstances changed) addressed to Melbourne.

4th. But the silence of the charter party upon points of vital importance to both parties, if it was intended that it should attach to the ship after she left Melbourne, is of the strongest weight.

How could the owners have been willing to bind themselves and their ship by a contract which should take effect after she left Melbourne, wheresoever notice reached the master, without making some provision in that contract for a probable or possi-

ble state of things which might involve them in severe loss? How could the charterers have been willing, without making some limitation of time, to bind themselves to keep an agent and funds at Calcutta, ready to load a ship under a contract to take effect when notice should reach the master, it may be, in distant seas, and pending or after intermediate voyages?

III.

Thus far as to the natural interpretation of the contract. It remains to find if the legal rules of construction, and the consequences that flow from them, warrant and will vindicate this interpretation.

The rules that govern in the construction of mercantile contracts of this description, as to whether their terms create conditions, are thus stated by an elementary writer: "It does not depend on any formal arrangement of the words, but on the reason and sense of the thing as it is to be collected from the whole contract. Constructions leading to absurd and unreasonable results will be avoided, *because when the intention is not clearly expressed parties will not be presumed to have meant to make an absurd or unreasonable contracts*" (Mande and Pollock on shipping, p. 135). See Slater *vs.* Emerson, 19 Howard, 224. We submit, then —

1st. In the view of Plaintiffs in error this is not the case of a condition inserted by one party to be performed by the other, on failure of which the former may, at his election, repudiate the contract. It is one in which both parties have agreed that in a certain contingency the contract shall absolutely not take effect, so that no repudiation by either party is necessary, as it would be where one party promises to do an act, and the other engages, on condition that such act is done, to do some other thing. In such case the obligation of the first party is absolute; that of the other is conditional, and he may waive or repudiate.

2d. But if we are bound to find in this contract a clear condition to be performed by the owners, the non-performance of which entitled the charterers to repudiate the contract, we submit that it is to be found in the clause, the "ship to proceed

from Melbourne to Calcutta with all possible despatch," inserted in manuscript in this charter.

The recent case of Graves *vs.* Legg, 9th Exchequer, 709, would seem to be decisive of this question.

In that case the plaintiffs contracted to import and sell the defendant wools, to be laid down in certain ports of England. The contract recited that it was "to be deliverable at Odessa during August, next *to be shipped with all despatch*, the names of the vessels to be declared as soon as the wools were shipped." The breach relied on in defence, as a condition precedent, was that the plaintiff did not notify defendant of the name of the vessel in which the wool was shipped as soon as it was shipped. The defendant repudiated the contract. In the argument and judgment the effect of the clause "to be shipped with all despatch," as a condition precedent, and forming part of the same clause, was discussed, and the requisition to give notice of the names of the vessels, held to be a condition, — on the ground, among other things, that the terms "to be shipped with all despatch," in the same clause, clearly constituted a condition precedent. Thus Parke, B., asks, p. 712, "could the plaintiff contend that the shipping the wools with all despatch is not a condition precedent?" and the counsel for the plaintiff substantially admitted that it was. In its judgment, the Court say the giving notice of the names of the ships "was a condition precedent, quite as much, indeed, as the shipping of the goods at Odessa, with all despatch, after the end of August" (p. 717).

3d. Cases may be cited by Defendant in error where charter parties have provided that the ship should sail with "all convenient speed," and in which the provision has been held not to be a condition precedent, entitling the charterer to repudiate the contract.

Tarrabochia *vs.* Hickie, 1 Hurl. and N. 183.
Freeman *vs.* Taylor, 8 Bing. 124.
Dimech *vs.* Corlett, 12 Moore, P.C.C. 199.

The reason is that stated in the first and last of the above cases, viz: "what is a convenient speed or reasonable time must always be a subject of contention. Where terms are so lax and ambiguous as to lead to a difference of opinion, then the stip-

ulation is not a condition precedent." The same reason is given in 12 Moore, P.C.C. p. 228. In the present case, the words "all possible despatch" are not equivalent to "reasonable time," and leave no ambiguity as to the intention of the parties, as is shown by the above case, 9th Exch. 709.

In the cases, Clipsham *vs.* Vertue, 5 Q.B. (N.S.) 265, and Hurst *vs.* Osborne, 18 C.B. 144, the stipulation to sail "with all convenient speed" applied to a prior part of the voyages, as to which no default was alleged. The contract, therefore, as to the disputed part of the voyages was merely the implied one to sail within a reasonable time.

IV.

The principal reliance of Defendant in error, in the Court below, and one which governed the decision there, was the supposed doctrine that whether a stipulation in a charter party constitutes a condition precedent or not may be determined by proof that its violation had or had not the effect to frustrate the voyage, and that, as in this case, the charterers do not (as they say) show that the voyage was frustrated, they are to be charged. For this they rely on Clipsham *vs.* Vertue, 5 Ad. & Ell. N.S. 265; Freeman *vs.* Taylor, 8 Bing. 124; Hurst *vs.* Osborne, 18 C.B. 144; Seegur *vs.* Duthie, 8 C. B., N. S. 45; Dimech *vs.* Corlett, 12 Moore, P.C. 199; and Behn *vs.* Burness, 5 Law Times Reporter, 670 (January, 1862). To this we reply: —

It is not to be denied that some of the above cases assert the principle as stated. But the conflict in the cases, and the obvious unsoundness of the doctrine, has led, since this case was argued, to its revision in the Exchequer Chamber, on an appeal in the last of the above cited cases.

> Behn *vs.* Burness, 8 Law Times Rep. p. 207 (Apr. 1863).
> 32 Law Journal, N.S. part 9. Q.B. 204.

This case will be found to review the preceding cases, and to establish the following propositions: —

1st. That whether a descriptive statement in a written instrument is a mere representation, and so "not an integral part

of the contract" (unless fraudulently made), or whether it is a substantive part of the contract, is a question of construction by the Court.

2d. That the previous cases turn upon very nice distinctions, but that the true doctrine, as established by principle as well as authority, is, that, "generally speaking, if such descriptive statement was intended to be a substantive part of a contract, it is to be regarded as a condition on failure or non-performance, of which the other party may, if he is so minded, repudiate the contract *in toto*, provided it has not been partially executed in his favor."

3d. That, if a party voluntarily receives the benefit of a partial execution, "he cannot afterwards treat the descriptive statement as a condition, but only as an agreement, for breach of which he may bring an action to recover damages."

4th. That the doctrine of some of the cases relied on by Defendant in error, that a descriptive statement of this kind "may be regarded as a mere representation if the object of the charter party be still practicable, [but] may be construed as a warranty if that object turns out to be frustrated," is unsound, "because the instrument, it should seem, ought to be construed with reference to the intention of the parties at the time it was made, irrespective of events which may afterwards occur."

Plaintiffs in error have only to add that, looking at the circumstances disclosed in the present case, it cannot be doubtful whether the words "ship to proceed from Melbourne to Calcutta with all possible despatch" was, and was intended to be, "a substantive part of the contract."

V.

But for the doctrine thus resulting from this recent review of the cases in England, it might be useful to examine the present state of the rule so often cited in the cases relied on by Defendant in error, viz.: that, where an agreement or covenant by one party forms part only of the consideration which moves from him to another, for the performance by that other of his part of the contract, said agreement or covenant is to be deemed not a

condition, but an independent covenant. Boone *vs.* Eyre, 1 H. Black, 273, note, and 1st Wm. Saunders, 320, are usually cited as the fountains of the doctrine.

The Court will find in Ellen *vs.* Topp, 6 Exch. 441–2, the first suggestion of the difficulty of the rule, viz., that it may vary an instrument by matter *ex post facto* (a difficulty which a recent case, above cited to some extent, provides for, by making a partial acceptance a waiver of the condition). The Court also suggest that Boone *vs.* Eyre could not be supported, unless "the residue of the consideration was a substantial part of the contract." See also the discussion by Parke B. in Graves *vs.* Legg, 9 Exch. 116–17. Perhaps the rule in Boone *vs.* Eyre would be free from objection if it were limited, so that it should be applicable only where *on the face of the contract* it appears that the covenant attempted to be set up as a condition clearly forms but part of the consideration. If this be doubtful, it should be construed as a condition or not, dependent on the surrounding circumstances *at the time of execution*, and without reference to matter *ex post facto*.

VI.

It is possible that the Court may think that the position, "if the ship should arrive at Melbourne before these instructions, and the master should have engaged his ship," may properly be construed more comprehensively than we have above claimed it to be. The words "engaged his ship" may be satisfied for the purpose of this contract by sailing from Melbourne in search for engagements elsewhere. Such sailing would be, so far as the charter was concerned, in all respects as effective as an engagement at Melbourne. If this be the true construction the charter party by its terms became null.

VII.

There remains a technical question, viz.: By the terms of the charter party, the contract is declared to be made by "E. Bangs & Son, owners." This is in manuscript. The proofs show (Record, p. 11) that three other parties are joint owners with them, but that they were ships' husbands. Can Plaintiffs maintain suit in their own names to enforce the contract?

It is clear that if Plaintiffs had not added to their names the declaration that they were the owners of the ship, they might have maintained the action in their own names, although they were not owners but agents. They could do this because the contract was with them *nominatim*. But as they added the fact that they were the owners, — and they are not so, — can they recover damages, if they prevail, to any greater extent than that ownership?

Indeed, as the charterers bargained for the whole ship, and as the charter is not signed by Plaintiffs as agents, but as owners, only their interests as owners passed by it. This ought to defeat the contract unless charterers, after knowledge, accepted and acted under it.

Humble *vs.* Hunter, 12 Ad. and Ell. N.S. 310.
Rayner *vs.* Grote, 15 Mee. and Wels. 359.

Supreme Court of the United States.

No. 186.

WILLIAM T. LOWBER, JOHN R. WILMER, AND F. LENNIG,

PLAINTIFFS IN ERROR,

vs.

ELKANAH BANGS AND WILLIAM H. BANGS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

Brief for the Defendants in Error.

Supreme Court of the United States.

No. 186.

WILLIAM T. LOWBER, JOHN R. WILMER, AND F. LENNIG,

PLAINTIFFS IN ERROR,

vs.

ELKANAH BANGS AND WILLIAM H. BANGS.

Points and Authorities for the Defendants in Error.

THIS is an action of assumpsit, to recover damages for a refusal to load the ship Mary Bangs, under a charter-party, for a voyage from Calcutta to the United States. At the time the charter was made, the ship was on her way from New York to Melbourne.

The charter contains the following provision; "Ship to proceed from Melbourne to Calcutta with all possible despatch."

In consequence of an accident to the English mail-steamer, the mail in which the letter of instructions was sent to the master of the Mary Bangs did not arrive at Melbourne until after she had left that place for Manilla, and did not reach the master until he had arrived at Manilla. (Record, p. 12.) On receiving the instructions, he at once took the ship to Calcutta, and offered to take the cargo under the charter. (Record, p. 11.) It is agreed, that voyages from New York to Melbourne, the unloading of such a cargo as the Mary Bangs carried out, and the trip from Melbourne to Calcutta, *usually* occupy from one hundred and forty-nine to two hundred and thirty-two days: the Mary Bangs actually arrived at Calcutta in two hundred and ninety-nine days after leaving New York, so that there was a delay of only sixty-seven days beyond the time of a voyage which

would not be considered an unusual one. The main question is, whether the fact, that the ship proceeded first to Manilla, and thence to Calcutta, instead of going directly, gave the charterers a right to avoid the charter. The owners claim, that the clause, "Ship to proceed from Melbourne to Calcutta with all possible despatch," is not a condition precedent, but a stipulation merely; a breach of which gives the charterers a claim for damages, if any were suffered, but does not give them a right to avoid the contract, unless they can show that the whole object of the voyage was frustrated by the breach.

First Point.

In this case, the charterers suffered no damage whatever from the delay, and the object of the voyage was not frustrated. It is agreed that after the arrival of the Mary Bangs in Calcutta, and after she was ready and had offered to receive a cargo, the charterers engaged another vessel, of about the same tonnage, to take her place, and loaded her with a cargo purchased with funds provided for the Mary Bangs. (Record, p. 13.)

The charterers' letter shows that they seized upon the failure to proceed direct to Calcutta as an excuse for refusing to perform an unprofitable contract, and not that they had in any respect changed their position, or suffered any loss in consequence of the delay. (Letter dated Dec. 7, 1858. Record, p. 16.)

They say, "We consider it (the sailing of the Mary Bangs for Melbourne) a fortunate circumstance, so far as we are concerned; since freight can be obtained so much lower at Calcutta."

The delay was undoubtedly advantageous to the charterers. They had three vessels to arrive at Calcutta. The Mary Bangs arrived in about two weeks after the others sailed. As business is done in Calcutta, cargoes being purchased in small lots, this was undoubtedly more convenient for the charterers. The Mary Bangs had only forty lay-days; but the other vessels were detained about two months in procuring cargoes, and they took all the merchandise which had been collected up to the time of their

departure. It is therefore probable, that, if the Mary Bangs had arrived sooner, either she or one of the other vessels would have been detained much longer to get a cargo. Although the charterers had purchased some merchandise intended for the Mary Bangs, they had not prepared to load her, as the saltpetre, the article first loaded, had not been purchased. All the merchandise which was purchased for the Mary Bangs was needed to fill the other vessels.

The plaintiffs in error never claimed that they were injured. Although in November Mr. Wilmer received information of facts which he supposed discharged him from all obligation to load the Mary Bangs, and he was bound by his instructions to use his best judgment as to the time of procuring a substitute (letter of Dec. 7, 1858, Record, p. 16), he did not engage another vessel to take her place until a short time after her arrival. This shows conclusively, that, in the opinion of Mr. Wilmer, the Mary Bangs arrived at the best time for the interest of the plaintiffs in error. There does not appear to have been any material change, either in the markets or in the position of the charterers, between November and February. It does not appear that freights fell, or that the market for merchandise changed, between those dates.

The damages in the case have been agreed upon; and they are the same as if the Mary Bangs had proceeded at once from Melbourne to Calcutta, and the charterers had refused to load. They are the difference between the freight under the charter and the feight actually received. The charterers did not claim the deduction of a dollar on account of the delay of the Mary Bangs. This conclusively shows that the object of the voyage was not frustrated.

Second Point.

It has been decided in a large number of English cases, that such clauses as "ship to proceed with all convenient speed," or "in a reasonable time," or "with all possible despatch," and simi-

lar clauses, are not, in charter-parties, conditions precedent, but are merely independent stipulations; and, unless the alleged breach goes to the whole root and consideration, it only gives a claim for damages.

In Clipsham *vs.* Vertue, 5 Ad. & El. N.S. 265, it was held, on demurrer, that a failure to perform a stipulation in a charter-party, to sail "within a reasonable time," was no answer to an action for not loading; it not being alleged that the purpose of the voyage was frustrated.

See also Fothergill *vs.* Walton, 8 Taunt. 576.

In Freeman *vs.* Taylor, 8 Bing. 124, the charter contained a stipulation to proceed from the Cape of Good Hope to Bombay "with all convenient speed." The master wilfully deviated, and went to Mauritius, and caused a delay of six weeks. The Court directed the jury to find whether the deviation deprived the defendant of the benefit of the contract.

In Tarrabochia *vs.* Hickie, 1 Hurlst. & Nor. 183, the charter contained a provision, that the vessel should "sail with all convenient speed." The jury found, in an action for refusing to load, that the vessel did not sail with all convenient speed; but the Court held that this was no excuse for a refusal to load, because it did not appear that the object of the voyage was wholly frustrated by the breach of the stipulation.

See also Hurst *vs.* Usborne, 18 C.B. 144; 36 E. L. & Eq. 299; Seegur *vs.* Duthie, 8 J. Scott N.S. 45.

In Dimeck *vs.* Corlett, 12 Moore, P.C. 199, the vessel was described as now at anchor in the port of Malta; and it was agreed, that "she, being tight, stanch, and strong, and properly manned, and every way fitted for the voyage, should, with all convenient speed, proceed in ballast to Alexandria, in Egypt." The ship was not then finished, and did not get ready to sail for more than a month.

Held, that the failure to sail "with all convenient speed" was no answer to an action for a refusal to load, because the

charterer had not shown that the object of the charter-party was frustrated by the delay; it not being "shown that the charterer had taken up any other vessel, or declined any cargoes, or in any way altered his position, in consequence of the delay."

In Behn *vs.* Burness, 5 Law Times Rep. N.S. March, 1862, p. 670 (decided by the Q.B., January, 1862), the charter provided that the good ship Martaban, "now in the port of Amsterdam," should, "with all possible despatch, proceed direct to Newport." Held, that the words, "now in the port of Amsterdam," were not a condition precedent.

In some cases, it was held in England, that a stipulation in a charter to sail on or before *a day certain* was a condition precedent; and such stipulations were distinguished from those containing the words, "all convenient speed," "within a reasonable time," and "with all possible despatch."

Glaholm *vs.* Hays, 2 Man. & G. 257.
Ollive *vs.* Booker, 1 Exch. 416.

In Tarrabochia *vs.* Hickie, 1 Hurlst. & Nor. 183, Pollock, C.B., said, "It is not a condition precedent, that a vessel should sail with convenient speed or in a reasonable time. When, indeed, the charter-party provides that the vessel shall sail on a particular day, that is a condition precedent. The distinction is obvious. When a particular day is named, it is evidently the intention of the parties, that the vessel should sail on that day; and, if the ship-owner refuses to do so, the merchant may decline to load: for the voyage is thereby altered; and the success of the adventure may depend on the vessel sailing on the day named. . . . There can be no doubt about a particular day; but what is a 'convenient speed,' or a 'reasonable time,' must always be a subject of contention. We may, therefore, fairly say, that when a particular day is named, the time is unambiguously expressed; but, when the terms are so lax and ambiguous as to lead to a difference of opinion, then the stipulation is not a condition precedent."

But in the very late cases of Dimeck *vs.* Corlett, 12 Moore,

P.C. 199, and Behn *vs.* Burness, 5 Law Times Rep. N.S. p. 670, March, 1862 (decided by Q.B., Jan. 21, 1862), the case of Ollive *vs.* Booker was questioned; and, in the latter case, three of the four judges were of opinion, that *even the naming of a day certain* did not make a clause in a charter-party a condition precedent.

But there appears to be no decision in which a clause similar to that in this case has been held to be a condition.

These decisions are based upon a principle which has been universally recognized in this country.

In Boone *vs.* Eyre, 1 H. Bl. 273 n., Lord Mansfield laid down the rule as follows: "When mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where they go only to part, where a breach may be paid for in damages, then the defendant has a remedy on his covenant, and shall not plead it as a condition precedent."

See opinion in this case in the Circuit Court, by Clifford, J.

Abbott on Shipping, p. 266.

Davidson *vs.* Gywnne, 12 East, 381.

Mill-Dam Foundry *vs.* Hovey, 21 Pick. 417, 437.

Philadelphia, Wilmington, & Baltimore R. Co. *vs.* Howard, 13 How, 307.

THIRD POINT.

In cases which arise on mercantile instruments, courts will, to avoid uncertainty, give that construction to particular words and phrases which has been judicially given to them; but if this were a new question, and, without the aid of previous decisions, we were compelled by a comparison of the different parts of the instrument, and a consideration of the circumstances under which it was made, to seek for the intention of the parties, it is clear that the words, "ship to proceed from Melbourne to Calcutta with all possible despatch," must be construed as an independent stipulation, and not as a condition, for the following among other reasons:

1. The clauses in the charter which were intended for conditions were made so in express terms. It is provided, that "should it so happen the ship should arrive at Melbourne before these instructions, *and* the master *should have engaged his ship* before receiving them, this charter will be void." If the parties had intended to give the same effect to the clause in question, they would have used the same language. It is agreed that the Mary Bangs was *not* "*at any time engaged* from the time of her arrival at Melbourne up to the 20th of January, 1859," when the master received notice of the charter at Manilla, and proceeded to Calcutta.

See Record, p. 11.

2. It was stipulated that the owners should use the most direct means to forward instructions to the master, with a copy of the charter ordering it to be fulfilled. This provision, taken in connection with the regular mail facilities over land to Melbourne, and the independent covenant to proceed to Calcutta with all possible despatch, were what the charterers relied on; and therefore it was not thought necessary to make it *a condition* that the ship should proceed to Calcutta with all possible despatch.

3. The words "ship to proceed from Melbourne to Calcutta with all possible despatch," if strictly construed as a condition, required that the ship, as soon as her cargo was discharged at Melbourne, should at once proceed to Calcutta. It is an absolute provision, not made dependent on the time instructions should be received, but with reference to the time of her readiness to sail.

The parties knew when they made the contract that no instructions could arrive at Melbourne before the 5th of September, the time when the first mail from England would be due; but the Mary Bangs, without meeting with any unusual good fortune, might have arrived at Melbourne and had her cargo discharged by the middle of August. It actually was discharged by the 1st of September. If the clause in question is to be

construed as a condition, the parties are chargeable with the absurdity of having made a contract which would be void, under circumstances which would make it for the interest of both parties to have it performed, and which were likely to arise. The parties, therefore, did not make this clause a condition, but provided that the charter was to be void only in case the ship should arrive, and "*be engaged*" *before the arrival of the instructions.*

4. The construction which gives the clause in question the force of a stipulation does substantial justice to both parties. The owners agreed that their ship should proceed from Melbourne to Calcutta with all possible despatch. If she did not do it, the owners are liable for all the damage the charterers suffered. The owners were not relieved from their obligation to perform the charter by the departure of the Mary Bangs from Melbourne to Manilla. Had the Mary Bangs proceeded to Singapore or Batavia seeking freight, instead of Manilla, she would have been nearly on the direct course to Calcutta. The owners, it is agreed, sent letters to those places, directing the master to perform the charter. Those are the most important ports near to Melbourne; and, from the fact that the owners sent letters to those ports, it is probable that she was expected to sail for one of them. It cannot be supposed that the parties intended that the charter should be void in case the Mary Bangs had proceeded to Batavia, and her master had there first received intelligence of the charter. Had the Mary Bangs arrived at Melbourne early in August, and sailed for Singapore or Batavia before the 1st of September, and before (even if no accident had happened) the first mail could have reached Melbourne, she would have reached Calcutta sooner than if she had awaited the first mail to Melbourne. Taking into account the usual length of the voyage to Melbourne, and the usual time occupied in discharging a vessel at that port, and the general instructions to the master to seek freight there or elsewhere, and the fact that Singapore and Batavia are central points from which intelligence can be most easily had from all parts of the East Indies, the chances

were nearly even, at the time the contract was made, that the master of the Mary Bangs would first receive his instructions at Singapore or Batavia. The cargo of the Mary Bangs was actually discharged on the 1st of September, five days before the earliest time for the arrival of the instructions.

5. The charterers suffered nothing by construing this as a stipulation. As soon as they knew that the stipulation was broken by the sailing of the Mary Bangs for Manilla, they were at liberty to act in such way as they might find the purposes of the voyage required. If, so acting in good faith, they had engaged another vessel, or in any other way materially changed their position before the arrival of the Mary Bangs at Calcutta, the object of the charter would have been frustrated, and the charterers released from their obligation to perform it. Perfect justice is done to all parties by regarding this as an independent stipulation; while, if it is held to be a condition, the plaintiffs, without any wilful default, and without having damaged the defendants, or in any way affected their condition, are deprived of the whole benefit of the contract.

6. To the argument, that the ship-owners could not have intended to covenant that their ship should, wherever found, in whatever sea, however laden or employed, upon advice of this charter, hasten at once to Calcutta, the answer is obvious. They did provide, that, if the ship was "engaged" before notice, the charter should be void. If she was not engaged, they knew she would undoubtedly go to Manilla, Batavia, Singapore, or some one of the ports in that part of the world, "seeking freight;" and they accordingly sent letters of advice in season to reach the master at those places, and were willing to take and did take the risk of getting the ship to Calcutta in season. (Record, p. 12.

The charterers argue this case as if a provision had been put into the contract that the ship should receive instructions while at Melbourne. It is a sufficient answer to say, that the parties inserted no such provision. But if the words, "the master to receive instructions at Melbourne," had been inserted, they would

not have been a condition precedent. In Behn *vs.* Burness, Jurist, 1862, p. 358, the clause "now in the port of Amsterdam" was held not to be a condition precedent. Our case is much stronger; for a statement as to an existing fact is much more readily construed as a condition than a promise as to the future.

FOURTH POINT.

The burden is on the charterers to show that the object of the voyage was frustrated.

Dimeck *vs.* Corlett, 12 Moore, P.C. 199.
Tarrabochia *vs.* Hickie, 1 Hurlst. & Nor. 183.

FIFTH POINT.

The action was properly brought in the names of the part owners, by whom the charter was made. They had control of the ship, and had her in readiness to perform the charter. As far as the charterers are concerned, they were the owners.

Seeger *vs.* Duthie, 8 J. Scott, N.S. 45.

In the case of Humble *vs.* Hunter, 12 Ad. & E., N.S. 310, it was held, that, where a person not even a part owner of a vessel made a charter in which he described himself as owner, the real owner could not bring an action in his own name on the charter. It was assumed that the action must be in the name of the agent, who had described himself as principal.

See cases cited in opinion by Clifford, J., in this case, in the Circuit Court, which is printed herewith.

B. R. Curtis

REPORT

OF THE

DECISION IN THIS CASE IN THE CIRCUIT COURT.

CIRCUIT COURT OF THE UNITED STATES.

FIRST CIRCUIT. DISTRICT OF MASSACHUSETTS. OCTOBER TERM, 1862.

BANGS *et al.* v. LOWBER, *et als.*

A VESSEL, while on a voyage to Melbourne, was chartered by the managing owners to defendants for a voyage from Calcutta to a port in the United States. The charter-party contained a clause that the vessel was to "proceed from Melbourne to Calcutta with all possible despatch." Before the master was advised of this engagement, the vessel had sailed from Melbourne to Manilla, seeking business; and did not arrive at Calcutta as soon as the parties had contemplated. The defendants refused to load the vessel; and upon suit to recover damages for a breach of the charter-party, brought by the managing owners, who were described therein as "owners" of the vessel, it was held,

1. That, although there were other owners, the suit was rightly brought in the names of those subscribing the charter-party in good faith.
2. That the clause quoted above was not a condition precedent, but an independent stipulation, which gave the charterers a claim for damages on failure of performance by the owners, but did not give them the right to avoid the contract, because it appeared that the object of the voyage was not wholly frustrated thereby.

This was an action of assumpsit, and came before the Court on an agreed statement of facts; from which it appears, that on the ninth day of June, 1858, while the ship Mary Bangs was on a voyage from New York to Melbourne, the plaintiffs, who were managing owners, entered into a charter-party with defendants, in

which it was agreed that the vessel should "proceed from Melbourne to Calcutta with all possible despatch," and there receive a full cargo to be provided by defendants, and transport the same to a port of discharge in the United States; that, although the plaintiffs used due diligence in informing the master of the ship of this contract, the information, owing to an interruption of the mails, did not reach him until he had left Melbourne and arrived at Manilla with his vessel, in search of business. Upon receipt of this intelligence, he sailed for Calcutta; where he arrived twenty-sixth of February, 1859, and reported himself to defendants' agent as ready to receive cargo. Besides the Mary Bangs, the defendants, at about the same time, chartered two other vessels for a voyage from Calcutta to the United States, and placed their agents there in funds to lade them as well as the Mary Bangs. As soon as they learned that the Mary Bangs had sailed from Melbourne to Manilla, they instructed their agents at Calcutta that this deviation nullified the engagement, which they considered a fortunate circumstance, as freights had fallen; and, under their instructions, the agent declined to furnish a cargo for her, but took up another vessel, and loaded her with a cargo purchased after the arrival at Calcutta of the Mary Bangs, with funds originally provided by defendants to freight the latter vessel.

The action was brought by the managing owners, who subscribed the charter-party, as "owners," to recover damages for breach of defendants' engagement to lade the vessel; and it was agreed, that, if the Court were of opinion they could maintain the action, an assessor should be appointed to ascertain the amount of damages they were entitled to recover.

CLIFFORD, J. Suit is brought in the name of the managing owners; and it is objected by the defendants, that it cannot be maintained, because the other owners of the vessel are not joined: but the suit is upon the charter, and, inasmuch as the other owners are not named in the contract, they could not be joined in the suit; so that, unless the action can be maintained in the present form, the owners are without remedy. Much reliance is placed by the defendants upon the case of Humble *vs.* Hunter, 12 Ad. &

El. N.S. 310, to sustain the objection; but it does not appear to support the doctrine for which it is cited. Charter-party in that case had been executed in the name of the son; but the suit was in the name of the mother, who was the sole owner of the vessel. Parol proof was offered at the trial to show that the mother was the real owner of the vessel, and that the son had signed the charter-party as her agent, and not as principal. Objection was duly made to the admissibility of the evidence, because the son was described in the charter-party as the owner of the vessel; but it was admitted, and the jury returned their verdict in favor of the plaintiff. Whereupon the defendant obtained a rule *nisi* to set the verdict aside; and, after argument, it was made absolute, upon the ground that the parol evidence went to contradict the written contract. Lucas *vs.* Delacour, 1 M. & S. 249; Robson *vs.* Drummond, 2 B & Ad. 303. No such question, however, arises in this case, as is obvious from the first reading of the agreed statement. Managing owners and ship's husband executed the charter-party in their own name; and, having brought suit to recover damages for a breach of the contract, the defendants offer to prove that other persons also are part owners of the vessel. They do not prove, or offer to prove, that the plaintiffs were not fully authorized to make the contract on which the suit is brought, or that the vessel was not rightfully in their possession and under their control. Where the minority in interest refuse to participate in the voyage, vessels are often employed by those owning the majority interest; and, if the latter have the lawful possession and control of the vessel, it has never been held that a charter-party executed by them was invalid; and, if obligatory upon the ship, no reason is perceived why it should not be equally so upon the charterers. Enough is not proved in this case to defeat the right of recovery, even if the objection under other circumstances would be a valid one; and, upon that ground alone, it must be overruled: but I am of the opinion, that a charter-party, executed in good faith in the name of the managing owners and ship's husband, is a valid instrument, binding upon all concerned, and that a suit for damages founded upon the same

is well brought in the names of the owners expressed in the instrument. Seeger *vs.* Duthie *et al.*, 8 J. Scott, N. S. on p. 55, ii. Two principal positions are assumed by the defendants to show that the plaintiffs ought not to prevail upon the merits.

1. They insist, in the first place, that, by the true construction of the charter-party, it was a condition precedent, that the owners should use the most direct means to forward instructions to the master; and that, upon the receipt of the same, the vessel should be found at Melbourne, and disengaged. Proper means, it is admitted, were used by the owners to forward the instructions; but the position is, that, inasmuch as the vessel had left Melbourne before they were received, the stipulations of the charter-party did not attach at all, because the parties contemplated that the vessel would be at that port, ready to proceed to Calcutta with all possible despatch.

2. Secondly, they insist, that if, by the true construction of the charter-party, its provisions attached to ship wherever found, still it must have a reasonable interpretation as to time, and that the long period which elapsed before the vessel arrived at Calcutta discharged the defendants from any obligation to load her. Several other propositions are submitted by the defendants; but those already mentioned embrace the whole substance of the defence, as understood by the Court.

I. Whether a particular covenant is to constitute a condition precedent depends upon the intention of the parties, as it is to be collected from the instrument in which the covenant is contained. Such was the rule laid down by Lord Ellenborough, in Havelock *vs.* Geddes, 10 East. 563; and it is one often cited and universally approved. Charter-parties are commercial instruments; and their construction should be liberal, agreeably to the intention of the parties, and conformable to the usage of trade in general, and of the particular trade to which the contract relates. Abbott on Ship. 326. Questions of this nature frequently arise; and there are few that are more difficult to solve, or of more practical importance. Intention is the primary rule; and when that is discovered, as was well said in the case of Stavers *vs.* Curling,

3 Bing. N. C. 355, all technical forms of expression must give way. Undoubtedly, a particular covenant by one party may be a condition precedent, so that the breach of it will dispense with the performance of the contract by the other; and whether it is such, or is an independent covenant, is a question to be determined according to the fair intention of the parties, to be collected from the language employed by them: but an intention to make any particular stipulation a condition precedent should be clearly and unambiguously expressed. Where mutual covenants go to the whole of the consideration on both sides, said Lord Ellenborough, in Ritchie *vs.* Atkinson, 10 East. 305, they are mutual conditions, the one precedent to the other; but when the covenants go only to a part, then a remedy lies on the covenant to recover damages for the breach of it; but it is not a condition precedent. Boone *vs.* Eyre, 1 H. Black, 273. Unless the non-performance, alleged in breach of the contract, goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured may be compensated in damages. Davidson *vs.* Gwynne, 12 East. 389; Abbott on Ship. 342; 2 Smith Lea. Cas. (ed. 1855), pp. 26 & 27; Seeger *vs.* Duthie *et al.*, 8 J. Scott, N. S., p. 45. Accordingly, it has been held in repeated cases, that such clauses in a charter-party as "ship to proceed with all convenient speed," or "in a reasonable time," or "with all possible despatch," or the like, are not conditions precedent in such instruments, but are clearly independent stipulations, unless it appears that the alleged breach goes to the whole root and consideration of the contract. Take, for example, the case of Clipsham *vs.* Vertue, 5 Ad. & El. N. S. 265, where the stipulation in the charter-party was to load, and forthwith proceed to the port of destination. Charterer refused to load; and, upon suit being brought, pleaded to the action, that the vessel did not arrive at the port of lading until after an unreasonable delay. To that plea the plaintiff demurred; and the plea was held bad, because it did not show that the delay frustrated the object of the voyage. Fothergill *vs.* Walton,

8 Taunt. 576, where the charter-party contained a stipulation to proceed from one port to another "with all convenient speed;" and the master, instead of conforming to the stipulation, wilfully deviated, causing a delay of six weeks; and, in consequence of the deviation, the agent of the defendants refused to load the vessel.

Tindall, Ch. J., left it to the jury to determine whether the deviation deprived the freighter of the benefit of the contract. Freeman *vs.* Taylor, 8 Bing. 124. "Sail with all convenient speed" were the words of the charter-party in Tarrabochia *vs.* Hickie, 1 Hurlst. & Nor. 183; and the jury found, in an action for refusing to load, that the vessel did not sail with all convenient speed: but the Court held that the finding was no answer to the action, unless it also appeared that the object of the voyage was wholly frustrated by the breach of the stipulation. Hurst *vs.* Usbone, 18 C. B. 144. Similar views were also expressed in Dimeck *vs.* Corlett, 12 Moore P. C. 199, where the stipulation was that the vessel, being tight, stanch, and strong, and properly manned, and every way fitted for the voyage, should, "with all convenience speed," proceed in ballast to a designated port; and it appeared at the trial that she was not then finished, and did not get ready to sail for more than a month. It was held, that the failure to sail as stipulated was no answer to the action, without proof of other loss than that occasioned by the falling of freights. Defendants suppose that the cases, Glaholm *vs.* Hays, 2 M. & G. 257, and Ollive *vs.* Booker, 1 Exch. 416, assert a different doctrine; but that opinion does not appear to find support in the later cases. Tarrabochia *vs.* Hickie, 1 Hurlst. & Nor. 183; Seegur *vs.* Duthie *et al.*, 8 J. Scott, N. S. 45; Dimeck *vs.* Corlett, 12 Moore, P.C. 199. Perhaps the latest case is that of Behn *vs.* Burness, Law Rep. N. S., London, March, 1862, where the stipulation was that the ship, "now in the port of Amsterdam, shall, with all possible despatch, proceed to Newport;" and it was distinctly held, that the description of the place where the vessel was supposed to be was not a warranty or condition precedent.

Both parties understood that the vessel was at sea, and that she might arrive at Melbourne and be engaged by the master before her instructions would come to hand; and they accordingly stipulated, that, in that event, the charter should be void. Engagement of the ship before the instructions were received, was to render the charter void; but, in the view of the Court, there is not a word in the instrument to warrant the conclusion, that the parties contemplated that any such consequence should flow from the arrival of the vessel at that port, and her temporary departure seeking business. Parties doubtless expected that the ship would proceed from Melbourne to Calcutta; but, when the provision in that behalf is compared with the one providing for the forwarding of instructions, it is evident that it was not intended as a warranty or condition precedent, as the latter is framed in the most general terms possible, clearly indicating that the parties contemplated that the instrument might reach the master at other ports than the one to which he was immediately destined. All possible despatch was required of the vessel, and the owners were required to use the most direct means to forward instructions to the master; but no provision was inserted to render the charter void, unless the master should have engaged the ship before the instructions came to hand. Support to this view of the case is derived from the fact, that no day is fixed for the departure of the vessel from Melbourne, or for her arrival at Calcutta. Unless the instructions were received by the master before the vessel sailed to seek business, it must have been understood by the defendants that some delay would necessarily ensue in the departure of the vessel; and if, in that contingency, they had been unwilling to accept the contract, the reasonable presumption is, that they would have insisted that some more specific provision upon the subject should have been inserted in the charter-party. Provision was made to protect the plaintiffs, in case the vessel was engaged; and, as the parties appear to have understood the effect of a condition precedent, it may well be supposed, that, if they had intended that the contract should be null in case the vessel sailed from Melbourne before the master

received the instructions, they would have said so in terms as explicit as those employed in respect to the engagement of the vessel.

Nothing of the kind, however, is to be found in the instrument; and I am of the opinion, that nothing of the kind was intended.

2. Delay ensued, beyond question, for a longer time than the parties expected when the charter-party was executed; and the remaining question is, whether it was of a character, and for such a length of time, as to justify the defendants, under the circumstances, in refusing to load the vessel. When a day is appointed for the payment of money, or part of it, or for doing any other act, and the day *is* to happen, or may happen, before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied on *his remedy*, and did not intend to make the performance a condition precedent: and so it is where no time is fixed for the performance of that which is the consideration or other act. 1 Wms. Saunders, 319, *b*. Moral wrong is not imputed to the plaintiffs in this case, and could not be, if attempted, with any success, as the whole evidence shows that the delay of the vessel was the result of an unforeseen accident, over which the plaintiffs could exercise no control. Under those circumstances, the rule is, that the delay is no answer to the action for a refusal to load the vessel, unless it appear that the effect was to frustrate the voyage. Additional authorities to this point are unnecessary, as those already cited are full to the point. Milldam Foundery *vs.* Hovey, 21 Pick. on p. 439; Stavers *vs.* Curling, 3 Bing N. C. 355. Applying that rule to the present case, it is quite obvious what the result must be. Sufficient saltpetre, or its equivalent, for ballast, was to be furnished by the defendants; but their agent had not purchased any of the article when he wrote to them on the twenty-seventh day of November, 1858, that he should consider himself at liberty to throw up the charter. Freight, per charter-party, was thirteen dollars for whole pack-

ages, and half-price for broken storage; but, when the defendants refused to load the vessel, the rate had fallen more than one-half: which, taken in connection with the letter of the defendants' agent, affords strong ground to conclude that the market rate of freight had more to do with the refusal to load the vessel than any delay which had ensued on her arrival. Full confirmation of that view of the case, if any be needed, is also derived from the subsequent conduct of the agent of the defendants in chartering another vessel to take the place of the Mary Bangs, and loading her with the funds provided to purchase a cargo for the vessel of the plaintiffs.

In view of the whole case, I am of the opinion that the plaintiffs are entitled to recover; and, according to the agreement of the parties, an assessor must be appointed to report the amount.

Supreme Court of the United States.

WILLIAM T. LOWBER, JOHN R. WILMER, AND F. LENNIG,

PLAINTIFFS IN ERROR,

vs.

ELKANAH BANGS AND WILLIAM H. BANGS.

Supplemental Brief for the Defendants in Error.

SINCE the brief for the defendants in error was printed, the decision of Behn *vs.* Burness, in the Queen's Bench, has been overruled in the Exchequer Chamber. Law Times, Vol. viii. N.S. 207. The words, "Now in the port of Amsterdam," in a charter party, were held to be a condition. But the Court did not question the decisions in Terrabochia *vs.* Hickie, 1 H. & N. 183; Dimech *vs.* Corlett, 12 Moore, P. C. C. 199; and in Clipsham *vs.* Vertue, 5 Q. B. 265, or any other cases in which it was held that a stipulation that a vessel will sail with all convenient speed, or within a reasonable time, is only an agreement, and not a condition. But it was held, that there was a distinction between "stipulations that some future thing shall be done, or shall happen," and "statements in a contract, descriptive of the subject-matter of it, or of some material incident thereof." The decision was based upon the ground that the statement that the vessel "was now in the port of Amsterdam," was of a definite fact at the date of the contract, and was not a stipulation as to the future.

The distinction was taken, between a mere representation, and a statement which is a substantive part of a contract. Those which are substantive parts of the contract, were divided into independent agreements, and conditions precedent. Williams, J., in delivering the opinion of the Court, dissented from a suggestion made, in Dimech *vs.* Corlett, that a clause might be regarded as representation, if the object of the charter be still practicable, but as a warranty, if the object turns out to be frustrated. He said the instrument ought to be construed with reference to the intention of the parties at the time it was made, irrespective of the events which may afterwards occur; but he recognized the propriety of inquiring, when in any case the Court has once decided that a stipulation does not amount to a condition, whether a breach of the stipulation is of such an essential character as to frustrate the object which the charterer had in view, and to justify him in refusing to perform his part of the contract. On this ground the decisions in Freeman *vs.* Taylor, Terrabochia *vs.* Hickie, and Dimech *vs.* Corlett, were approved.

In the charter party of the "Mary Bangs," the clause, "Ship to proceed from Melbourne to Calcutta, with all possible dispatch," is merely a stipulation that a future thing should be done, and cannot, according to any of the principles stated in the opinion in Behn *vs.* Burness, in the Exchequer Chamber amount to a condition,

Benj. R. Curtis

Geo. O. Shattuck

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